

2021 CAPITAL LITIGATION CONFERENCE: DELVING INTO DEFENSE EXPERTS

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EXPERTS AND DIFFERENT TOPICS

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EXPERTS

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experts

several different kinds:

1. routine doctors on the county list
2. routine doctors not on the county list
(usually due to money issues)
3. outside experts with little to no experience in competency issues

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Experts: routine county expert

- routine county experts are often hired as they are convenient, readily available, and understand the rules.
- will normally write a much more detailed report and include more testing than they would normally include
- will often comment that the appointed doctors didn't do as much as they did, or meet with the defendant as many times

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Experts: familiar non-county expert

- are routinely the defense go-to witness
- because they don't have a contract will feel free to talk about how the appointed dr did not do enough
- reports are consistent over time and defendant
- will say they don't have result driven findings but ...
- normally the same expert will be used over and over for a couple of years and then they move to someone new.

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Experts: out of state experts

- these experts often don't know the rules or statutes of your jurisdiction and will say anything they want
- will often do excessive testing
- will often skew results to fit narrative
- will have so much experience and work (professor, clinical practice, runs hospital, numerous boards, etc, etc,) it is amazing they have time to do anything.

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What to do?

READ THE REPORTS CAREFULLY

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Expert Reports

1. What was the expert hired to do? (should be in first paragraph)
2. Is expert part of the team, or genuinely independent?
 - a. Did expert send a draft report to defense
 - b. Did expert make any changes after defense reviewed
 - c. Did expert say anything to defendant about being on the "team"
3. Did expert use advised consent form and was it disclosed?

apa.org/ethics/code

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Expert Reports

- Did the expert indicate source of information obtained
- should be a list of what reviewed
(example: CHS records – should have time frame included)
 - should have dates and pages if available to show where in records located to make clear who said what
(example: CHS mh note 11-20-20 ...)
 - should indicate who made statement
(example: was it a statement def made or staff)

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Expert Reports

Often, the expert will not, on the stand be able to say where the record is from instead merely uses generic "in the record"

- was he psychotic when he came into custody because of drugs?
- was he acting psychotic and the doctors believed malingering?
- does defendant later admit he was malingering?

Context is important!

Be the person in the room who knows the records best

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Expert Reports

WHO SAID WHAT

- what is self-report
- what is self-report from an earlier time
(just because an earlier record says def advised ..., doesn't make it true)
- what is report from family
is it supported by records (school, hospital, etc.)

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Interviews

- How much time did expert spend with defendant?
- Was time spent in interview or testing?
- How long and in what order were tests given?
(how long was testing? Was def given breaks? Was def able to focus?)
- Did you take notes?
- (do the notes reflect what is in report? Are there full quotes in report that are not in notes? Do notes reflect length of time of interview?)
- Did the expert write a report?

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Testing

You should receive:

- list of all tests given
- all raw data and testing material of all tests
- manuals of tests? (hit or miss: yes daubert, no rules)

Do not allow defense to argue that the raw data should not be given directly to you. You are the person cross-examining the expert and the ethical rules do NOT preclude you from receiving them!

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Effort/Malingering/Exaggeration

WHEN ANY TESTING IS DONE, MAKE SURE THAT STAND-ALONE TESTS OF EFFORT, COOPERATION, MALINGERING, EXAGGERATION USED

- Imbedded testing insufficient – why not a test right on point

- Know what test is being used

- Test of effort?

- Test of memory malingering?

- Test of psychiatric exaggeration?

Testing memory when a defendant is exaggerating psychiatric symptoms is meaningless.

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Testing

Compendium or individual books on tests

Google individual tests

Consult with your expert

KNOW THE LATEST EDITION OF THE TEST

KNOW PURPOSE OF THE TEST

KNOW THE POPULATION TEST IS VALIDATED ON

KNOW WHAT LANGUAGE IS APPROPRIATE

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Testing

If you understand standard deviations – good for you!

If you don't – you can count – make sure expert's numbers are correct

Don't forget the measure for error

If multiple tests for same issue, are results consistent?

If computer generated test – did you get the computer summary?

mmpi: test generates a report, make sure you get report

- when test says could be a, b, c, does expert only say a

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Multiple Experts

Once someone reports something it is considered part of the record.
Who said what is important.

pre and post offense matters

- if pre: why was the record created (Did def have secondary gain? Did records indicate effort?

- if post: how related to defense (cancer, probably not related.
Current testing regarding self reported symptoms, probably)

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Finally

an expert in psychology, psychiatry, etc. is an expert in that field.
They are not experts in the law.

Know the law as it relates to your specific case.

Mental Illness: does not equal incompetency

Delusions: do they effect defendant's criminal case

Intellectual disability: expert may argue higher level than needed

Cruz CR2015-123744-002 (5-4-20 minute entry)

Ritter CR2018-006777-002 (12-3-20 minute entry)

Email if you would like a copy

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